Supreme Court, U. S.
FILED
JUL 26 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976
No. 76-113

VIOLET JOSEPHINE FELDMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI -
(Supreme Court Rule 23)
TO THE SUPREME COURT
OF THE UNITED STATES

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

VIOLET JOSEPHINE FELDMAN, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered

in the above entitled case on June 23, 1976.

OPINION BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit is reported at 530 F.2d___ and is printed in Appendix A hereto, infra, page A-1. The Journal Entry of Judgment of Conviction of the U.S. District Court for the Central District of California, Case No. 74-1686 is printed in Appendix A hereto, infra, page A-12.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1976. A timely petition for rehearing was denied on June [illegible], 1976 (Appendix A, infra, page A-10). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the affidavits in support of an application for wiretap authorizations are sufficient to meet the various requirements of 18 U.S.C. Section 2516 and 18 U.S.C. Section 2518(1) (c) and (3) (c), and whether they demonstrate that normal investigative techniques have been tried and failed or reasonably appear

unlikely to succeed.

2. Whether the interception of intrastate phone calls was in violation of 18 U.S.C. Section 2517, Subsection 4 in that they were privileged communications under the California Constitution and Penal Code and should have been suppressed.

STATUTES INVOLVED

1. 18 U.S.C. §1955,

"Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business, shall be fined not more than $20,000.00 or imprisoned not more than five years or both."

2. 18 U.S.C. §2,

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

STATEMENT OF CASE

On November 19, 1974, Indictment No. 1686 was filed charging petitioner, VIOLET JOSEPHINE FELDMAN, and others with one count each of violating 18 U.S.C. Section 1955

(illegal gambling business) and 18 U.S.C. Section 2 (aiding and abetting) during the period of November 14, 1973 through approximately January 2, 1974.

A motion to suppress evidence obtained through a court order authorizing the interception of oral communications (No. Misc. 4002 and 4033) was filed and made in the District Court, the Honorable Manuel L. Real, Judge Presiding. The motion was denied.

The wire tap evidence was introduced and formed a very substantial part of and was essential to the Government's case and without which the conviction could not be sustained.

REASONS FOR GRANTING WRIT

This case warrants a review by certiorari of the nine grounds urged on appeal. Five of which deal with the wire tap. These were all considered as evidenced by the opinion.

It appears that a reversal would follow based on any one of said grounds. This Honorable Court may well construe the authorities relied upon by petitioner differently than those expressed in the opinion.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner
VIOLET JOSEPHINE
FELDMAN

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. VIOLET JOSEPHINE FELDMAN, *Defendant-Appellant.*	No. 75-1303
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. IRVING HYMAN, *Defendant-Appellant.*	No. 75-1526

OPINION

[May 5, 1976]

Appeal from the United States District Court
Central District of California

Before: CARTER, GOODWIN and KENNEDY,
Circuit Judges.

CARTER, Senior Circuit Judge:

The defendants were charged below with violation of 18 U.S.C. § 1955 (illegal gambling business) and of 18 U.S.C. § 2 (aiding and abetting)..were convicted in a non-jury trial and sentenced. Their appeals have been consolidated.

Each defendant made a motion to suppress evidence obtained by a court-authorized electronic surveillance of telephone calls. On appeal they urge that under 18 U.S.C. § 2516 and § 2518(1)(c) and (3)(c) the trial court erred in denying the motion to suppress.

We affirm.

CONTENTIONS ON APPEAL

1. That the affidavits in support of the order for electronic surveillance failed to satisfy the requirements of 18 U.S.C. § 2518

EXHIBIT "A"

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(1)(c) and (3)(c) that there be a showing that other investigative techniques had been tried and failed or that they would be reasonably unlikely to succeed if tried or would be too dangerous.

2. That the showing that confidential informants had refused to testify in court proceedings was insufficient.

3. That the affidavits in support of the order for electronic surveillance were defective in that they did not meet the two-pronged test of *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969).

4. That the affidavits did not establish probable cause for the issuance of a search warrant; therefore, they were insufficient to support an order for electronic surveillance of telephones.

5. That the Assistant Attorney General authorizing the electronic surveillance did not comply with 18 U.S.C. § 2516 in that there is no showing that he arrived at his decision only after a careful evaluation and screening of the request.

6. That the order for surveillance was applied improperly to public telephones.

7. That the interception of intrastate telephone calls violated 18 U.S.C. § 2517(4) since the Constitution of California and its Penal Code made the calls privileged communications within 18 U.S.C. § 2517(4).

8. That 18 U.S.C. § 1955 is unconstitutional.

9. That Title III (18 U.S.C. §§ 2510-2520) is unconstitutional.

THE FACTS

The facts at trial were obtained from the wiretapped conversations, a written stipulation, the testimony of F.B.I. Agent Cross and of defendant and accomplice Zambros, who was granted immunity. That evidence revealed a large-scale bookmaking operation in metropolitan Los Angeles during the 1973 football season, including daily wagers often exceeding $2,000. Hyman occasionally assisted in the day-to-day management of the operation, but he and Feldman served primarily as "agents" who relayed bets to the appropriate "front". If the bettor won, the agent would pay him; if he lost, the agent would collect from him. The taped conversations helped to verify Zambros' identification of the defendants as active agents in the operation.

There were four other defendants below. The charges against *Farkas* were dismissed as part of a plea bargain after he pled guilty to charges in a related case. *Eisenberg* and *Hanft* pled guilty prior to trial. *Zambros* was granted immunity and appeared as a government witness.

I.

Sections 2518(1)(c) and (3)(c) Were Satisfied.

Defendants first contend that the affidavits of Special Agent Charles B. Walker did not satisfy the requirement of 18 U.S.C. § 2518(1)(c)[1] (describing the application for a court order) of

> "a full and complete statement as to whether or not other investigative procedures have been tried and failed *or why they reasonably appear to be unlikely to succeed if tried* or to be too dangerous;" (emphasis added)

The argument is two-fold: (1) that the affidavits recite the insufficiency of alternative procedures in gambling prosecutions *in general,* whereas the statute requires that the alternatives must have failed or be likely to fail *in the particular case at hand:* and (2) that the other allegations in the affidavits reveal that other methods would have worked in the present case.

The first part of the argument is interesting and is persuasive that law enforcement agencies may not rely upon the general difficulty of apprehending and convicting bookmakers to justify the use of wiretapping. But that issue need not be reached because the affidavits of Special Agent Walker clearly indicate that numerous alternative procedures were either tried or reasonably rejected *in this case.* The affidavits indicate that (1) confidential sources One through Six refused to testify in court proceedings; (2) physical surveillance had been tried and was continuing, but was unsuccessful in establishing the necessary elements of the crime with respect to most of the participants; (3) the nature of *this* operation was such that apprehension by means of infiltration, phone spots, codes, floating field lieutenants, or use of telephones

[1] 18 U.S.C. § 2518(3)(c) relates to the matters to be considered by the judge in making his determination of the application. It reads:

> "(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;"

with limited toll record outputs, was highly unlikely, particularly since the operation would most likely be dissolved at the close of the football season, thereby precluding some lengthy and cumbersome procedures which might otherwise be employed.

Defendant Feldman suggests some ways in which surveillance, infiltration, etc. *might work.* She cites no authority, however, entitling her to second-guess the F.B.I. and invalidate a warrant authorizing wiretaps by suggesting a number of possible alternatives reasonably discarded as not feasible by those in charge of the investigation.

This circuit has upheld the validity of an affidavit similar to the one in our case, stating ". . . the law does not require that a wiretap be used only as a last resort." *United States v. Kerrigan,* 514 F.2d 35, 38 (March 10, 1975), *cert. den. sub nom. Karrigan v. United States,* 423 U.S. 924 (1975). *United States v. Smith,* ..... F.2d ..... (9 Cir. July 2, 1975) states:

> "Congress, in its wisdom, did not attempt to require 'specific' or 'all possible' investigative techniques before orders for wiretaps could be issued. As *United States v. Giordano,* 416 U.S. 505 at 515 (1974) states—wiretap 'procedures were not to be routinely employed as the initial step in criminal investigations,' but it is equally true 'that the law does not require the government to use a wiretap only as a last resort.' *United States v. Kerrigan* [*supra*], *United States v. Starno,* 358 F. Supp. 852, 856-7 (E.D. Pa. 1973)."

United States v. Turner, ... F.2d ..... (9 Cir., July 24, 1975) states, after quoting 18 U.S.C. § 2518(1)(c):

> "In this respect the affidavits in support of the applications stated that Ethridge was suspicious of being followed by law-enforcement officers; that the Kinglet Drive and Blue Heights residences were located on single-lane roads in mountainous areas, making undetected visual observations extremely difficult; that informants were unwilling to testify against Ethridge for fear of retaliation; that Ethridge's unwillingness to deal with strangers precluded undercover infiltration of his organization; that while agents had knowledge of Ethridge's involvement, they had been unable, by resort to normal investigative procedures, to obtain evidence to convict him and the other members of his organization.

"In our judgment these affidavits provided that necessary 'factual basis,' *see United States v. Kerrigan*, 514 F.2d 35, 38 (9th Cir. 1975), to indicate that the 'practical and commonsense' standard, S.Rep. No. 1097, *supra*, at 101, required under the statute was satisfied. *See United States v. Brick*, 502 F.2d 219, 224 (8th Cir. 1974); *United States v. James*, 494 F.2d 1007, 1014-16 (D.C. Cir. 1974); *United States v. Falcone*, 364 F.Supp. 877, 888-90 (D.N.J. 1973), *aff'd on this issue on opinion below*, 505 F.2d 478, 480 (3d Cir. 1974), *cert. denied*, 95 S.Ct. 1339 (1975)." (slip sheet, p. 8).

United States v. Robertson, 504 F.2d 289 (5 Cir. 1974), *cert. denied*, ... U.S. ....., stated that the purpose of § 2518(1)(c) was not to "foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques. . . . The provisions contemplate that 'the showing be tested in a practical and commonsense fashion.' S.Rep. No. 1097, 90th Cong., 2d Sess. 100 U.S.Code Cong. & Admin.News 1968, pp. 2112, 2190." *Id.* at 293.

In *Robertson, supra*, the court also refused to scrutinize the affidavit piecemeal, require feasible but assertedly impractical physical surveillance, or question the essentiality of information sought by way of wiretaps: "To hold otherwise would constitute unwarranted court interference with legitimate investigative discretion contrary to the congressional intent." *Id.* at 293.

In our case, as indicated *supra*, the affidavits indicate a conscientious effort on the part of the F.B.I. to employ "other investigative procedures" where possible. Only after these alternatives failed to produce sufficient evidence to take to trial and other methods were discarded as reasonably "unlikely to succeed if tried," was the warrant authorizing electronic surveillance sought. That is all the statute requires.

II.

The Refusal of Informants to Testify May Be Properly Relied On.

Defendants contend that the statement in the affidavits that the informants had stated they would refuse to testify even if granted immunity is legally insufficient.

The same problem was raised as to the *Kerrigan* affidavit, which was held sufficient. *United States v. Kerrigan, supra*, p. 38. In *United States v. Turner, supra* (slip sheet, p. 8) the affidavit recited "that informants were unwilling to testify against Ethridge for fear of retaliation." As shown in the quote above, the affidavit was held sufficient.

III.

The Two-Pronged Test of Aguilar and Spinelli Has Been Satisfied.

Defendants contend that the affidavits supporting the application for the wiretap do not meet the two-pronged test set forth in *Aguilar v. Texas*, 378 U.S. 108, 114 (1964), namely: (1) "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were," and (2) "some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed . . . was 'credible' or his information 'reliable.'" *Accord Spinelli v. United States*, 393 U.S. 410, 413 (1969).

An inspection of the affidavits herein shows a detailed and concise statement of the investigation and complete background material.

The first affidavit (#4002), executed on November 13, 1973, lists six sources or informants. In the case of each informer there was a satisfaction of the first prong, and the circumstances surrounding the informant's conclusion, in fact in most if not all instances, the informant is definitely naming and quoting his sources of information, including defendants Feldman and Hyman. In each case the second prong of the test is satisfied by the facts demonstrating the reliability of the informant—generally past activities in correctly supplying information and contributing to arrests or convictions—and corroboration by interviews by agent or by surveillance and observance by agents or by materials obtained by an authorized interception.

The second affidavit (#4033) was executed on November 30, 1973. This affidavit contains the material obtained by the interception of phone calls pursuant to the order for interception based on the first affidavit. In addition it sets forth two sources or

informants satisfying the two tests, in the same manner as the first affidavit.

The affidavits of the F.B.I. agents relate to surveillance relayed to them by other agents, as well as the information supplied by the sources or informants.

Clearly, the two-pronged test of *Aguilar* and *Spinelli* has been satisfied.

IV.

Only Probable Cause for the Wiretap Order, Not Probable Cause for a Search Warrant, is Required.

Defendants begin their argument by noting that an application to intercept wire communications is not unlike an application to obtain a search warrant—an observation with which the government does not take issue. They go on to argue, however, that in view of this kinship, the statement contained within the affidavit submitted in support of the government's application to intercept wire communications in affidavit #4002, that the investigation into the suspected crime had not produced sufficient probable cause to obtain a search warrant, must also be construed as an admission that probable cause does not exist to intercept wire communications.

The defendants fail to distinguish, on the one hand, between probable cause to believe that a crime is being committed, and probable cause to believe that telephones are being used in furtherance of that crime, and, on the other hand, probable cause to believe that physical evidence of the crime exists at a specific location.

The statutory scheme in Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520) established a procedure, not for securing a search warrant, but for electronic surveillance of telephone calls. There was required a showing, which was clearly a showing of probable cause, to believe that a crime was being committed and that certain telephones were being utilized in furtherance of the crime. The statutory scheme did not concern search warrants for physical evidence at the scene of the crime. The affidavits followed and complied with the statutes.

V.

Approval by Attorney General Under 18 U.S.C. § 2516 Presumes Proper Exercise of Judgment.

Defendants do not challenge the authority of Assistant Attorney General Peterson to approve the application for wiretaps. They contend that the authorizations were defective because there is no showing that he arrived at his decisions only after careful evaluation and screening of the applications, in contravention of Supreme Court language that "The mature judgment of a particular, responsible Department of Justice official is interposed as a critical precondition to any judicial order." *United States v. Giordano*, 416 U.S. 505, 515-516 (1974).

The question raised has been settled in the Ninth Circuit in *United States v. Turner* (*supra*): ". . . the basis on which, or method by which he [the proper authorizing official] gave the authorization is not, in our judgment, subject to review for compliance with § 2516(1). Rather it is to be presumed that the official has properly exercised the judgment called for by the statute when he affixed his signature to an order authorizing an application." (slip sheet, p. 6).

VI. and VII.

The Surveillance Was Properly Applied to Telephones and Did Not Violate 18 U.S.C. § 2517(4).

18 U.S.C. § 2517(4) provides: "No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character." Defendants cite the California Constitution and provisions of its Penal Code, § 631, which proscribe the interception of telephonic communications without the consent of *all* parties to the conversation. Although there is an exception for state law enforcement officers, federal officers are not mentioned. Defendants contend that telephonic communications are therefore "privileged" in California with respect to federal officers under § 2517(4).

The contentions are foreclosed by *United States v. Kerrigan*, *supra*, p. 37, n.5, and *United States v. Turner*, *supra* (slip sheet, p. 13-14).

VIII.

18 U.S.C. § 1955 is Constitutional.

Defendants contend that 18 U.S.C. § 1955 is unconstitutionally broad with respect to Congress' finding that certain enumerated *types* of gambling operations have an effect on interstate commerce. This precise contention was rejected in *United States v. Sacco*, 491 F.2d 995 (9 Cir. 1974) (*en banc*). See *United States v. Kerrigan, supra*, p. 37, n.1.

IX.

Article III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 2510 to § 2520) is Constitutional.

Defendants contend that the statutes lack particularity in describing "the person, place or thing sought to be seized" and in describing "the crime", "the type of conversation sought", and in failing "to place adequate and proper limitations on officers executing the eavesdrop", e.g., "preventing searches of unauthorized areas", "protect[ing] innocent members of society", and "preventing further search . . . after the incriminating conversation is seized"; and that therefore Title III (and Sections 2510-2520) are unconstitutional in failing to meet the requirements of the Fourth Amendment and *Berger v. New York*, 388 U.S. 41 (1967) for the issuance of search warrants.

However, Title III has been consistently held to be constitutional. *United States v. Turner, supra*, has held Title III constitutional on its face against such attacks as made by the defendants herein and lists decisions from nine circuits to like effect. (slip sheet, p. 18-19).

In the foregoing portion of the opinion we have not cited *United States v. Kalustian* (9 Cir. No. 74-3314, December 11, 1975) ..... F.2d ..... We think *Kalustian* should be distinguished on the ground that the affidavits in *Kalustian* contained less particularity than the affidavits in the case at bar.

The judgments of conviction are AFFIRMED.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 5-11-76—400

Filed
June 23 1976
Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. VIOLET JOSEPHINE FELDMAN, Defendant-Appellant	)	No. 75-1303
	)	ORDER
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. IRVING HYMAN, Defendant-Appellant.	)	No. 75-1526

Before: CARTER, GOODWIN and KENNEDY, Circuit Judges.

The panel in the above entitled case voted to deny the petition for rehearing. Judges Goodwin

and Kennedy voted to reject the suggestion for rehearing en banc, and Judge Carter recommended the rejection of the suggestion for rehearing en banc.

The petition for rehearing and suggestion for rehearing en banc having been circulated to all active judges and no judge having voted for a rehearing en banc.

IT IS ORDERED that the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

JOURNAL ENTRY OF JUDGMENT OF CONVICTION OF THE U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, CASE NO. 74-1686

(Entered Volume 40, page 2)

On February 3, 1975, the court imposed sentence: 4 years suspended, defendant placed on probation for 5 years upon condition that she spend 10 days in a jail type institution, commencing February 15, 1975, said 10 days to be served on weekends, consecutively until 10 days were served, and that in addition, defendant was to do 150 hours of charitable work per year for the first three years of probation and was to not gamble or associate with gamblers and must stay out of places where gambling was conducted, whether lawful or not.

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VIOLET JOSEPHINE FELDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-113

VIOLET JOSEPHINE FELDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-9) is reported at 535 F. 2d 1175.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1976. A petition for rehearing and suggestion for rehearing *en banc* was denied on June 23, 1976 (Pet. App. A-10 to A-11). The petition for a writ of certiorari was not filed until July 26, 1976, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED[1]

1. Whether the application for electronic surveillance sufficiently showed the inadequacy of other investigative procedures.

2. Whether the application for the order was properly authorized.

3. Whether telephone conversations intercepted pursuant to court order should have been excluded from evidence because a California statute requires the consent of both parties before telephone conversations may be monitored.

STATEMENT

Following a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. She was sentenced to four years' imprisonment, with all but ten days of the term suspended in favor of five years' probation. She was also ordered to contribute 150 hours of work to charity for three years (Pet. App. A-12). The court of appeals affirmed (Pet. App. A-1 to A-9).

In orders dated November 13 and 30, 1973, a district judge authorized the wire interception of the conversations of a sports betting group headed by Samuel Farkas. The government's evidence at trial consisted primarily of tape recordings of conversations intercepted under the court's

[1]Although petitioner states that this case warrants review of all nine grounds urged on appeal (Pet. 4), she makes no argument on any of those issues and presents only the three we have identified as questions. Accordingly, we discuss only those three (see Rule 23(1)(c) of the Rules of this Court); in any event, petitioner's remaining claims were properly answered in the opinion of the court of appeals.

order, gambling records seized pursuant to a search warrant, the testimony of a witness expert in gambling activities, and the testimony of an accomplice who had been granted immunity. This evidence showed that petitioner was a principal agent for Farkas; her job was to relay bets to the appropriate front office clerk (Pet. App. A-2).

ARGUMENT

1. Petitioner asserts that the affidavit in support of the government's application for an order authorizing electronic interception failed to show that "other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," as required by 18 U.S.C. 2518(1)(c).

We have recently discussed the requirements of Section 2518(1)(c) in our memorandum in opposition to certiorari in *Steinberg* v. *United States*, No. 75-1040, certiorari denied, May 19, 1976; and our briefs in opposition in *Pezzino* v. *United States*, No. 75-6651, and *Anderson* v. *United States*, No. 75-500, petitions for writs of certiorari pending; *Green* v. *United States*, No. 75-962, certiorari denied, April 26, 1976, and *Lawson* v. *United States*, No. 75-659, certiorari denied, 424 U.S. 927.[2] We there noted that the requirements of Section 2518(1)(c) are satisfied when the affidavit, read in a practical and commonsense fashion (see S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)), shows sufficient factual basis from which the issuing authority can reasonably conclude that electronic surveillance is necessary to obtain evidence for the successful prosecution of persons known to be involved in the activities under investigation, or is necessary to ascertain

[2]We are sending petitioner's counsel copies of our filings in those cases.

the full scope of their activities and identify the participants. See *United States* v. *Turner*, 528 F. 2d 143, 152 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, 423 U.S. 996.

The court below correctly found that the affidavit of Agent Charles Walker provided such a factual basis. The affidavit related that six informants had provided information concerning Farkas's illicit gambling activities (Aff. 5-11, 16-19),[3] but that each of the informants had "stated that even if immunized and given protective custody [he] would be unwilling to testify at any proceeding for fear for [his] safety" (Aff. 23). Agent Walker further swore that thorough consideration had been given to infiltrating the gambling operation or conducting a physical search, but that these possibilities had been rejected because, under the circumstances, they were not feasible (Aff. 23-24).

This conclusion is amply supported by Walker's affidavit. A confidential informant revealed that Farkas "ha[d] become extremely secretive * * * in order to avoid the police" and used a bookmaking agent "to contact his bookmaking employees and to direct his bookmaking operation" (Aff. 8). Another informant reported that Farkas's "back office" was not using any fixed office locations for running his gambling activities (Aff. 6-7). Furthermore, extensive physical surveillance disclosed that the group utilized a pay telephone located in a small neighborhood market for most of its gambling activities (Aff. 11-16, 23). Because of the telephone's location in the store, it was not possible to observe it from the outside, and constant surveillance inside the market could have

[3]"Aff." refers to the November 13, 1973, affidavit of Agent Walker in support of the government's application for a wire intercept order, a copy of which we are lodging with the Clerk of this Court.

been readily detected (Aff. 16). Although agents were able occasionally to overhear gambling-related conversations being conducted over the telephone (Aff. 14-15), this surveillance was not sufficient to disclose the full extent of the gambling activity and the identities of other participants therein.[4]

On the basis of this affidavit, the court of appeals correctly found that there had been (Pet. App. A-5)—

> a conscientious effort on the part of the F.B.I. to employ "other investigative procedures" where possible. Only after these alternatives failed to produce sufficient evidence to take to trial and other methods were discarded as reasonably "unlikely to succeed if tried," was the warrant authorizing electronic surveillance sought.

Further review of this essentially factual determination is unwarranted.[5]

[4]The telephone company did not maintain permanent records of the originating or terminating numbers of calls made from the pay telephone involving a charge of less than 30 cents (Aff. 16). Thus, without electronic surveillance it would not have been possible to discover the identity of the party receiving the calls.

[5]As we have noted (see briefs cited *supra*, p. 3) a panel of the Ninth Circuit, in *United States* v. *Kalustian*, 529 F. 2d 585, appears to have interpreted Section 2518(1)(c) to require greater specificity in the supporting affidavits than have other panels of the Ninth Circuit or panels of other circuits. The Ninth Circuit has to date refused to resolve this conflict. Since no other court of appeals has followed *Kalustian*, and future affidavits can be drafted to conform to the stringent *Kalustian* standards, we have concluded that it is not necessary to ask this Court to review the decisions in which various panels of the Ninth Circuit have suppressed evidence on the authority of *Kalustian*. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902. In any event, petitioner does not challenge the conclusion of the court below (Pet. App. A-9) that "*Kalustian* should be distinguished on the ground that the affidavits in *Kalustian* contained less particularity than the affidavits in the case at bar." Accordingly, this case does not directly present the *Kalustian* issue.

2. Petitioner also contends, without supporting argument, that the application for an intercept order was not authorized as required by 18 U.S.C. 2516.[6] That contention was properly rejected by the court of appeals, upon whose opinion we rely (Pet. App. A-8):

> Defendants do not challenge the authority of Assistant Attorney General Peterson to approve the application for wiretaps. They contend that the authorizations were defective because there is no showing that he arrived at his decisions only after careful evaluation and screening of the applications, in contravention of Supreme Court language that "The mature judgment of a particular, responsible Department of Justice official is interposed as a critical precondition to any judicial order." *United States* v. *Giordano*, 416 U.S. 505, 515-516 (1974).
>
> The question raised has been settled in the Ninth Circuit in *United States* v. *Turner* [528 F. 2d at 151]. ". . . the basis on which, or method by which he [the proper authorizing official] gave the authorization is not, in our judgment, subject to review for compliance with §2516(1). Rather it is to be presumed that the official has properly exercised the judgment called for by the statute when he affixed his signature to an order authorizing an application."

3. Finally, petitioner raises the question whether her intercepted conversations were privileged under 18 U.S.C.

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[6] 18 U.S.C. 2516(1) provides: "[A]ny Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for * * * an order authorizing * * * the interception of wire or oral communications * * *."

2517(4)[7] and should have been suppressed because California law forbids the unconsented monitoring of wire communications. See Cal. Penal Code §631 (West 1970).

The legislative history of Section 2517(4) demonstrates that the privileges referred to are those based on the relationship of the parties to the conversation, such as lawyer-client and husband-wife. "The scope and existence of these privileges varies from jurisdiction to jurisdiction. [Section 2517(4)] is intended to vary the existing law only to the extent it provides that an otherwise privileged communication does not lose its privileged character because it is intercepted by a stranger." S. Rep. No. 1097, 90th Cong., 2d Sess. 100 (1968). Thus, it is clear that Section 2517(4) refers to conversations that are "privileged other than by virtue of their character as private telephone conversations." *United States* v. *Turner, supra,* 528 F. 2d at 155; *United States* v. *Kerrigan,* 514 F. 2d 35, 37 n. 5 (C.A. 9). The privilege the California statute creates, however, is designed to protect the confidentiality of private telephone conversations as such.

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[7] 18 U.S.C. 2517(4) provides: "No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character."

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1976.

DOJ-1976-10